

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-1286

IN THE  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

ALFRED DANIEL MILLER,

*Defendant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE



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For the Second Circuit

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**Docket No. 76-1286**

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

ALFRED DANIEL MILLER,

*Defendant.*

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**BRIEF FOR PLAINTIFF-APPELLEE**

**Issue**

The defendant was not denied due process of law as a result of the brief mention by a F.B.I. agent of a knife which was found in defendant's possession at the time of his arrest.

**Preliminary Statement**

Alfred Daniel Miller was charged in a three-count indictment filed with the Clerk of the United States District Court for the Western District of New York on August 14, 1975, with armed robbery of a federally insured Bank, 18 U.S.C. § 2113(a), larceny from the Bank, 18 U.S.C. § 2113(b), and the assault of a teller during the commission of the robbery, 18 U.S.C. § 2113(d).

On May 25, 1976, a suppression hearing was held before District Court Judge John T. Elfvin at the request of the attorney for the defendant, to determine the admissibility of prior convictions of defendant, and statements given by the defendant. (Government's Appendix at 2-3.) The court denied defendant's motion to suppress statements given by defendant, and granted the motion to suppress the use of the two convictions in the event the defendant took the stand. (Government's Appendix at 44.)

Trial commenced on the afternoon of the same day, May 25, 1976, and concluded on May 26, 1976, with the jury returning a verdict of guilty on all three counts. On June 7, 1976, defendant was sentenced to the custody of the Attorney General for a period of fifteen years. Defendant appeals.

### Statement of Facts

On July 31, 1975, at approximately 10:15 a.m., the Marine Midland Bank at Main and Seneca Streets, Buffalo, New York, was robbed by a lone negro male. (Government's Appendix at 47-49, 71.) The robber approached the teller's window, gave the teller a demand note, and frightened the teller by placing a replica handgun approximately six inches in front of her face. (Government's Appendix at 48, 66.) The teller gave the robber the money he demanded, including a packet of bait bills, thereby activating a surveillance camera, and the robber left the bank. (Government's Appendix 55-56.)

Summoned by a report of the robbery (Government's Appendix 67), Federal Bureau of Investigation Agents Langer, Sculimberene and Gill proceeded to the area of

the Bank at approximately 10:15 a.m. on July 31, 1975, (Government's Appendix 67-69), and observed an individual who fit the description of the bank robber which was given to the agents over their car radio. (Government's Appendix 69-70.) The agents left their car, called to the suspect, identified themselves as F.B.I. agents, and asked the suspect to stop. (Government's Appendix at 70). The suspect turned around and faced the agents, and then broke into a full run away from the agents. (Government's Appendix at 72.) The three agents pursued the suspect, and within minutes Agent Langer apprehended him. Langer examined the contents of the bag the suspect was carrying, and found a replica of a Colt police .38 revolver, a pair of sunglasses, safety glasses, a shirt, a paper bag, a blade knife, a knife case, sport coat, a jacket, a Marine Midland cloth bag, and \$1,943 in currency, (Government's Appendix at 75-76) which included the bait bills stolen from the Marine Midland Bank. (Government's Appendix at 81.) At trial, Agent Langer identified the defendant Miller as the man he apprehended (Government's Appendix at 83), and the bank teller, Karen Rice, identified the defendant as the man who robbed the bank. (Government's Appendix at 62.)

The defendant was arrested and transported to the Buffalo Office of the F.B.I.; after being advised of his right to remain silent, the defendant confessed that he committed the robbery at the Marine Midland Bank, described the details of the robbery, and read and signed a statement to that effect. (Government's Appendix 91-93.)

Seven or eight months prior to the suppression hearing and trial, the government provided defense counsel the opportunity to see all the physical exhibits in the case,



(Government's Appendix at 105, 117), and on the day of trial all 3500 material relating to all of the Government witnesses was turned over. (Government's Appendix at 43, 45, 105.) On the day of trial, after the jury had already been selected, defendant for the first time requested a suppression hearing, requesting suppression of the defendant's confession. At the hearing Agent Langer testified as to the circumstances of defendant's arrest, and enumerated items in defendant's possession when he was arrested, including a knife and a knife case. (Government's Appendix at 9, 10.) When this testimony was given at the suppression hearing, the defendant made no objection. Further, at the conclusion of the suppression hearing, defense attorney was given an opportunity to make any additional requests regarding suppression of evidence, but stated that he did not have any such requests. (Government's Appendix at 37-38.)

At trial Agent Langer again testified as to the contents of the bag in defendant's possession when he was arrested, (Government's Appendix at 75) identifying, among other things, the knife and describing it as having a figurine on the handle. (Government's Appendix at 76, 77.) After this testimony, direct examination of Agent Langer continued at some length without objection by defendant's attorney. (Government's Appendix at 77-84.) Following the government's direct examination of Agent Langer, defendant moved for a mistrial on the ground that the knife should not have been mentioned by Agent Langer. (Government's Appendix at 86.) The court initially denied the motion, (Government's Appendix at 90) and at the close of the government's case, defendant renewed his motion for a mistrial, (Government's Appendix 94) which was again

denied because the court found that the mention of the knife was not prejudicial. (Government's Appendix at 109.)

## ARGUMENT

### POINT I

**The testimony concerning the knife was relevant to the offense charged.**

The defendant argues that the trial court erred in not granting a mistrial when a knife, found in the possession of the defendant at the time of his arrest approximately ten to fifteen minutes following the bank robbery, was identified at the trial by the arresting F.B.I. agent. It is the government's contention that the knife was relevant evidence; that it would tend to prove defendant's state of mind at the time of the offense and his planning and intention to commit the crime; that it would have been properly admissible under these circumstances; and that, in any event, mention of the knife by the agent did not unfairly prejudice the defendant.

The Second Circuit has recognized that weapons found in the possession of an arrestee are relevant to show defendant's "opportunity or preparation to commit the crime," *U. S. v. Ravich*, 421 F.2d 1196, 1204 (2d Cir., 1970); see also *U. S. v. Fisher*, 455 F.2d 1101, 1103 (2d Cir., 1972); that the defendant "took the natural precautions that might be expected" when committing such a crime, *U. S. v. Pentado*, 463 F.2d 355, 360 (5th Cir., 1972), *cert. denied* 409 U.S. 1073, and that it could be considered a form of "criminal insurance for the success of the venture," *U. S. v. Campanile*, 516 F.2d 288, 292 (2d Cir.,

1975). This court has found such weapons to have probative value even in cases involving non-violent crimes, such as drug conspiracy, *U. S. v. Wiener*, .... F.2d ....., Slip Op. p. 2753 (2d Cir., 3-24-76), and in a non-violent bank theft which took place at night, *U.S. v. Campanile*, *supra*. Furthermore, the proffered weapons need not have been the weapons used to commit a violent bank robbery, in order for them to have relevance as establishing opportunity or preparation to commit the crime charged. *U. S. v. Ravich*, *supra*.

Such a background of case law clearly demonstrates that the knife in the instant case is relevant as proof of the crime alleged. The knife was found in defendant's possession approximately fifteen minutes after the bank robbery. From such a fact it can reasonably be inferred that the defendant also possessed the knife when he was in the bank, particularly because the knife was found in the bag with items defendant had in the bank, such as his change of clothing, the stolen currency, etc.

In addition to the relevance of the knife as proof of defendant's preparation for the criminal enterprise, it also has relevance as bearing on the claim of insanity, just as the change of clothing, safety glasses, and demand note also demonstrate the degree of thought and planning that preceded the criminal venture. Psychiatric testimony relative to defendant's state of mind at the time of the crime is supported by concrete evidence of defendant's preparatory measures for the robbery. Thus, the knife had relevance to the essential elements of the defense and could properly have been admitted against the defendant.



## POINT II

The judge's finding that there had been no prejudice to the defendant arising from the agent's testimony was proper.

The defendant argues that he suffered prejudice due to the jury's "consideration" of Agent Langer's testimony, (Appellant's Brief at 8, 13), and claims that the trial court should have declared a mistrial. The record is clear that Agent Langer only mentions the knife at one point during the course of his testimony in order to identify it when discussing his arrest and search of the defendant. (Government's Appendix pp. 76, 77); the knife is never mentioned again in the jury's presence. Furthermore, because of defense counsel's objection, (Government's Appendix pp. 86, 94-97) the knife was never admitted into evidence, and the jury never saw it.<sup>1</sup> Nor was the knife (or knife case) ever mentioned again by anyone during the course of the trial; its significance was not presented to the jury, and no arguments or inferences were urged because of it.

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<sup>1</sup> In contrast to this set of facts are other cases in which seemingly "inflammatory" exhibits were found to have sufficient probative value to be admissible. In *U.S. v. Ravich, supra*, a prosecution for bank robbery with the use of a dangerous weapon, six .38 pistols and ammunition were admitted into evidence and displayed to the jury on a table in the court room, when only half of these weapons had been used in the robbery. There seems to be little comparison between the effect of six guns being displayed to a jury, and one knife mentioned in the course of testimony. Similar situations existed in the *Wiener* and *Fisher* cases, *supra*, in which the probative value of certain weapons was found to outweigh their "inflammatory" or prejudicial tendencies.

The defense contention that the prosecution's failure to explain the relevance of the knife through questions to the psychiatrists reflects an inconsistency which only serves to obfuscate the issue. The initial objection to mention of the knife having been sustained by the court, the government was hardly in a position to jeopardize the trial by further mention of this admittedly minor aspect of proof. Although it is submitted the knife is unquestionably relevant and admissible, the government's decision not to pursue the point at trial should not now be urged as indication of its "prejudicial" impact and "irrelevancy".

It is significant to note that in spite of Judge Elfvin's initial concern over the possible "prejudice" of the knife (Government's Appendix pp. 89, 108) and his apparent attitude that the knife might have relevance on the issue of sanity, but nothing else (Government's Appendix pp. 89, 96, 99) —comments the defense urges are controlling in this appeal—Judge Elfvin ultimately concluded that there had been "no material or substantial prejudice to [the defendant] in this situation." (Government's Appendix p. 109). The law is clear that the weighing of prejudice against probative value is a task to be performed by the trial judge, and his finding will rarely be disturbed on appeal. *U. S. v. Pentado*, *U. S. v. Fisher*, *U. S. v. Ravich*, *supra*. Thus, Judge Elfvin's finding of no substantial prejudice should not be disturbed.

### POINT III

Even if the testimony concerning the knife was irrelevant, defendant's failure to timely object to its admissibility constitutes a waiver of the objection.

It is a well settled rule of evidence that proper objections must be made to irrelevant testimony at the time the testimony is offered. *U. S. v. Mayes*, 512 F.2d 637 (6th Cir., 1975); *Rich v. U. S.*, 389 F.2d 31 (8th Cir., 1968); *Scott v. U. S.*, 317 F.2d 908 (D.C. Cir., 1963). If such timely objection is not made, even potentially excludable evidence will be admitted. *U. S. v. Del Llano*, 354 F.2d 844 (2d Cir., 1965).

Defendant was well aware of the content of Agent Langer's testimony. The defense received 3500 material relating to Agent Langer prior to his appearance as a witness, and heard the agent's complete testimony at the suppression hearing, yet raised no objection to the admission of the knife. Furthermore, after Agent Langer testified at trial about the knife, defendant still did not object to the testimony, nor did he move to strike the testimony or request an appropriate instruction to the jury. Such a motion to strike, or request for limiting instruction could have served substantially the same purpose as an objection, but defendant chose to ignore these available remedies. *U. S. v. Del Llano, supra*. Such failure to make a proper objection to the testimony, or to move to strike it after admission, is a waiver of the right to object, and precludes appellate consideration of the issue. *U. S. v. Ambrose*, 483 F.2d 742 (6th Cir., 1973); *Bond v. U. S.*, 397 F.2d 162 (10th Cir., 1968).



The rationale behind requiring timely objections is that alleged errors in the proceeding should be noticed while there is still time for the judge to rectify the error, and avoid the necessity of further proceedings, possibly including a new trial. *U. S. v. Indiviglio*, 352 F.2d 276 (2d Cir., 1965); *U. S. v. Del Llano*, *supra*; *U. S. v. Woodner*, 317 F.2d 649 (2d Cir., 1963). Furthermore, the defendant may not sit idle, and later take advantage of a situation which, by his inaction, he has helped to create. *U. S. v. Grosso*, 358 F.2d 154 (3rd Cir., 1966), reversed on other grounds, 390 U.S. 62. It is clear from the record that this is precisely what defendant did prior to, and during trial. A motion to strike the testimony about the knife would, if granted, have provided an ample remedy for the alleged irrelevant testimony. Alternatively, a cautionary instruction to the jury concerning the testimony about the knife, could also have cured the alleged error. Defendant's request for a mistrial, after his waiver of the appropriate remedies was thus properly denied.

#### POINT IV

**The assault charged in Count III of the indictment does not require that objective capability of harm be demonstrated.**

Count III of the indictment charges the defendant with "assaulting" a bank teller, in violation of 18 U.S.C., § 2113(d), while committing the violations of 18 U.S.C., § 2113(a) and (b). Count III contains no language of putting in jeopardy the life of the teller by the use of a dangerous weapon. Although the defendant does not consider this distinction on appeal, the government recog-

nizes its duty to do so. See N.Y.S. Bar Association Code of Professional Responsibility, disciplinary rule 7-106(B)(1).

The Second Circuit has considered the elements of a § 2113(d) violation in *U. S. v. Marshall*, 427 F.2d 434 (2d Cir., 1970), and in *U. S. v. Stewart*, 513 F.2d 957 (2d Cir., 1975), and in both cases the court recognized a need for objective capability of physical harm in order to have a violation of Section 2113(d). The replica of a .38 revolver which was used in this case does not appear to satisfy this requirement. However, the indictments in the *Marshall* and *Stewart* cases alleged that the accused had put in jeopardy the life of an individual, whereas, in the instant case, defendant is charged only with the "assault" phrase under § 2113(d). Such a distinction in the wording of the indictment certainly is material to the issue of what elements must be demonstrated for a violation of this section to be proven.

An assault, that is, instilling immediate fear of bodily harm in the robber's victim, can be committed with a very realistic replica of a weapon, just as well as it can be with a loaded, fully operable weapon. A reasonable reading of the statute indicates that a violation is constituted either by an assault or by placing a life in jeopardy, in the course of committing a § 2113(a) or (b) violation. Furthermore, the case law does not preclude the inference that a charge of assault under § 2113(d) does not require an objective capability of harm. Therefore the conviction under § 2113(d) should be affirmed.

**Conclusion**

For the foregoing reasons, the judgment of conviction against the defendant should, in all respects, be affirmed.

Respectfully submitted,

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County of Genesee ) ss.:  
City of Batavia )

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vs  
Alfred Daniel Miller  
No. 76-1286

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Patricia A. Lacey

PATRICIA A. LACEY  
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